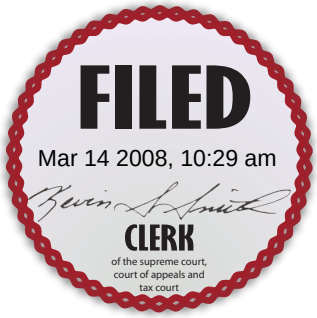

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IN THE
COURT OF APPEALS OF INDIANA

ESTATE OF WALTER O'NEAL HATFIELD By PAULINE HATFIELD, Personal Representative,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 82A01-0708-CV-375
JOHN O. HATFIELD,	)	
Appellee-Defendant.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0412-MF-959

March 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

On behalf of the estate ("the Estate") of Walter O'Neal Hatfield, personal representative Pauline Hatfield challenges the trial court's denial of the Estate's motions to amend its complaint against John O. Hatfield ("Hatfield") to include a claim for waste, and for a determination of deficiency.

We affirm in part, reverse in part and remand with instructions.

ISSUES

Whether the trial court abused its discretion when it denied the Estate's motions.

FACTS

On June 15, 2001, Hatfield executed an installment mortgage note ("the Note") to effect the purchase of two parcels of real estate owned by Walter O'Neal Hatfield ("Walter") in Vanderburgh County. The parties also executed a real estate mortgage ("the Mortgage") securing the Note. Walter died on July 4, 2003, and Pauline Hatfield was named personal representative of the Estate on August 13, 2003.

Under the terms of the Note, Hatfield promised to pay to Walter $250,000.00, "payable in [one hundred and ten] equal, consecutive, minimum monthly payments of $2,950.00 each, and a final monthly payment of $1,508.53, with payments beginning July 15, 2001 and continuing in a timely manner thereafter . . . until th[e] Note [wa]s paid in full." (Estate's App. 11). Another provision of the Note provided,

> In the event of default in payment of any said installments when due, or upon any other event of default under the Real Estate Mortgage executed concurrently herewith, the entire unpaid balance of principal and interest

> shall become due and payable immediately, without notice, at the election of the holder hereof.

(Estate's App. 11). Under the real estate mortgage ("the Mortgage"), executed concurrently with the aforementioned Note, Hatfield agreed to the following provisions:

> * * *
>
> 3. REPAIR OF MORTGAGED PREMISES: INSURANCE. The Mortgagor [Hatfield] shall keep the Mortgaged Premises in good repair and shall not commit waste thereon.
>
> * * *
>
> 6. DEFAULT BY MORTGAGOR: REMEDIES OF MORTGAGEE. The failure of the Mortgagor to make any payment provided for herein within 30 days following written demand by the Mortgagee, or failure of performance of any covenant or agreement of the Mortgagor hereunder within 60 days following written demand for that performance by the Mortgagee, shall constitute an 'event of default.' Upon an event of default by the Mortgagor in any payment provided for herein or in the Note, or in the performance of any covenant or agreement of the Mortgagor hereunder, or if the Mortgagor shall abandon the Mortgaged Premises, be adjudged bankrupt, or if a trustee or receiver shall be appointed for the Mortgagor or for any part of the Mortgaged Premises, then and in any such event, the entire indebtedness secured hereby shall become immediately due and payable at the option of the Mortgagee, without further notice, and this Mortgage may be foreclosed accordingly. Upon such foreclosure, the Mortgagee may continue the Abstract of Title to the Mortgaged Premises, or obtain other appropriate title evidence, and may add the cost thereof to the principal balance due. Further, upon an event of default by the Mortgagor, the Mortgagee shall have the right to take possession of the Mortgaged Premises, or the right to appointment of a Receiver upon application to a court of competent jurisdiction, and to collect the rents, issues and profits therefrom and use the same for the payment in whole or in part, first, of the Mortgagee's attorneys' fees, costs and commissions incurred or incident thereto, and next to the payment of principal and interest under the Note herein, and the Mortgagor assigns hereby the rents and income from the Mortgaged Premises for the purposes herein set out in any event of default.

(Estate's App. 4, 5).

When Hatfield failed to timely tender the mortgage payment due on May 15, 2004, the Estate exercised its option to declare the entire balance of his indebtedness immediately due. On December 10, 2004, the Estate filed a complaint on installment mortgage note and to foreclose on real estate mortgage, alleging that Hatfield owed $185,152.87 in principal,

> plus daily interest due thereupon after May 15th, 2004, per the terms of the Note, late charges, together with those expenses secured by the Mortgage which [the Estate had] incurred or will necessarily incur prior to the sale of the Mortgaged Property, including reasonable attorney's fees.

(Estate's App. 9). The Estate sought the following relief: (1) a personal judgment in the amount of $185,152.87, plus interest, late fees, costs and expenses, and attorney's fees; (2) foreclosure of Hatfield's mortgage; (3) sale of the real estate in a sheriff's sale; (4) delivery of the deed of conveyance and possession of the real estate to the Estate; (5) application of the sheriff's sale proceeds to Hatfield's indebtedness; (6) that Hatfield be adjudged personally liable to the Estate for any unsatisfied debts; and (7) that Hatfield's equity and right of redemption be foreclosed.

On July 19, 2005, the Estate filed a motion for summary judgment. The trial court granted the Estate's motion for summary judgment on November 11, 2005. On November 18, 2005, the Estate filed a proposed decree of foreclosure with the trial court; the trial court approved the decree on November 21, 2005, and issued it on November 30, 2005. In its decree, the trial court granted the Estate an *in rem* judgment in the amount of $203,419.84. The trial court also ordered the real estate sold at sheriff's sale and the proceeds applied to the payment of court costs and the repayment of Hatfield's

indebtedness.[1] Accordingly, the Estate filed a praecipe for sheriff's sale. On January 26, 2006, the sheriff of Vanderburgh County conducted a sheriff's sale at which the Estate was the highest bidder, purchasing the real estate for $180,000.00.

Subsequently, on October 5, 2006, the Estate filed a motion for determination of deficiency, wherein it also sought determinations as to attorney's fees and as to waste of the property. Hatfield filed a brief in opposition to the Estate's motion for determination of deficiency on March 20, 2007, arguing that (1) the Estate's deficiency judgment had already been determined and amounted to $24,501.84 -- the difference between the purchase price at the sheriff's sale ($180,000.00) and the total judgment amount ($204,501.84); and (2) the Estate was not entitled to additional damages for waste because "[the Estate's] present claim for additional damages [for waste was] directly related to the issues giving rise to the [Estate's] Complaint on Installment Mortgage Note and to Foreclose on Real Estate Mortgage," which complaint had made no mention of any alleged waste. (Estate's App. 37).

On March 27, 2007, Hatfield filed an objection to the Estate's motion for determination of deficiency. On April 4, 2007, the Estate filed a motion to amend its complaint to include a claim for waste, as well as a brief in support of its motion for determination of deficiency. On April 10, 2007, the trial court heard oral argument on

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[1] The trial court found that Hatfield's total indebtedness was as follows:

Principal	$185,152.87
Interest	$ 15,737.97
Attorney's fees	$ 3,500.00
Court costs	$ 111.00
	$204,501.84

the Estate's motion for determination of deficiency. On June 11, 2007, the trial court issued an order denying the Estate's motion to amend its complaint and its motion for determination of deficiency, from which order the Estate now appeals.

DECISION

The Estate argues that the trial court erred in denying its motion to file an amended complaint. The Estate also argues that the trial court erred when it denied its motion for determination of deficiency judgment.

1. Motion to Amend Complaint

We first address the Estate's claim that the trial court erred when it denied the Estate's motion to amend its complaint. Specifically, the Estate contends that because a mortgagee has "traditionally been permitted to sue a mortgagor for waste where the secured debt has been rendered unsafe," and because the Estate purchased the real estate at the sheriff's sale without knowledge of Hatfield's alleged waste, it was entitled to amend its complaint in order to recover damages. Estate's Br. at 4.

Indiana Trial Rule 15 governs the amendment of pleadings: "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires."

> Amendments to pleadings are to be liberally allowed. The trial court, however, retains broad discretion in granting or denying amendments to pleadings, and we will reverse only upon a showing of abuse of that discretion. In determining whether the trial court abused its discretion, we look to a number of factors, including 'undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiency by amendment previously allowed, undue prejudice to the opposing party by virtue of the amendment, and futility of the amendment.'

Leeper Elec. Services, Inc. v. City of Carmel, 847 N.E.2d 227, 230-31 (Ind. Ct. App. 2006) (quoting *Palacios v. Kline*, 566 N.E.2d 573, 575 (Ind. Ct. App. 1991) (internal citations omitted)).

The Estate characterizes the issue as a question of whether a mortgagee who purchases real estate at a sheriff's sale can recover from the mortgagor for waste. More aptly, the issue before us is whether the Estate's claim is barred by *res judicata*. "The doctrine of *res judicata* prevents the repetitious litigation of disputes that are essentially the same." *Afolabi v. Atlantic Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1173 (Ind. Ct. App. 2006). The *res judicata* doctrine is divided into two branches: claim preclusion and issue preclusion.[2] *Collins v. State*, 873 N.E.2d 149, 157 (Ind. Ct. App. 2007). We find the discussion of claim preclusion to be dispositive, and accordingly, will focus on that branch of the *res judicata* doctrine.

> Claim preclusion is applicable when a final judgment on the merits has been rendered and acts to bar a subsequent action on the same claim

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[2] Issue preclusion differs from claim preclusion in that it "applies where the causes of action are not the same, but where some fact or question has been determined and adjudicated in the former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties." *Perry v. Gulf Stream Coach, Inc.*, 871 N.E.2d 1038, 1048 (Ind. Ct. App. 2007). In other words,

> Issue preclusion, or collateral estoppel, bars the subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit. Where collateral estoppel is applicable, the former adjudication will be conclusive in the subsequent action even if the two actions are on different claims. However, the former adjudication will only be conclusive as to those issues that were actually litigated and determined therein. Collateral estoppel does not extend to matters that were not expressly adjudicated and can be inferred only by argument. In determining whether to allow the use of collateral estoppel, the trial court must engage in a two-part analysis: (1) whether the party in the prior action had a full and fair opportunity to litigate the issue and (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case.

Afolabi, 849 N.E.2d at 1175-76.

> between the same parties. When claim preclusion applies, all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action. Claim preclusion applies when the following four factors are present: (1) the former judgment was rendered by a court of competent jurisdiction; (2) the former judgment was rendered on the merits; (3) the matter now at issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action was between parties to the present suit or their privies.

Dawson v. Estate of Ott, 796 N.E.2d 1190, 1195 (Ind. Ct. App. 2003).

The Estate argues that neither branch of the *res judicata* doctrine operates to bar its claim for waste. As to applicability of claim preclusion, the Estate challenges only the existence of the third factor -- namely, the determination that the claim for waste was, and could have been, determined in the prior action. Specifically, the Estate argues,

> Claim preclusion is inapplicable as the issue of waste was not, nor could it have been, determined in the prior action (the foreclosure). As argued in the Estate's brief in support of its motion to determine deficiency, it did not know of the waste committed by Hatfield until it was the successful sheriff's's [sic] sale bidder and gained possession of the real estate.

Estate's Br. at 9. Hatfield counters that the Estate did have occasion to learn of any waste allegedly committed by Hatfield on the premises because pursuant to the real estate mortgage, the Estate was entitled to enter the premises upon an event of default by Hatfield, but it failed to do so. As to the Estate's failure to enter and inspect the premises upon his default, Hatfield argues,

> [The Estate] either chose not to do so or failed to do so for a period of nearly two (2) years. [The Estate] cannot now claim that the issue of waste could not have been determined in the prior action. [The Estate] had every legal right and opportunity to enter upon the real estate and determine and investigate if any waste had been committed and had a full and fair opportunity to include a claim for waste in its Complaint. [The Estate] chose not to enter on the premises and did not request relief for any alleged waste of the property until nearly three (3) years after it filed its

> Complaint and nearly sixteen (16) months after a final judgment has been rendered.

Hatfield's Br. at 4-5.

We turn to the language of the mortgage executed by the parties on June 15, 2001. As Hatfield contends, the mortgage provides that "upon an event of default by [Hatfield], the Mortgagee [Estate] shall have the right to take possession of the Mortgaged Premises . . . ." (Estate's App. 20). We do not know why the Estate declined to exercise its right to enter and take possession of the premises. What better opportunity existed to inspect the premises prior to the impending litigation? Notably, the Estate offers no explanation as to why it neglected to exercise this critical right.

In light of the Estate's telling omission, we must reject its contention that claim preclusion is inapplicable here. The parties do not dispute the existence of three of the four factors required for claim preclusion to apply: (1) that the former judgment was rendered by a court of competent jurisdiction; (2) that the former judgment was rendered on the merits; or (3) that the controversy adjudicated in the former action was between parties to the present suit or their privies. As to factor (4), whether the matter at issue was, or could have been, determined in the prior action, we find that the claim for waste could, in fact, have been determined in the prior action if the Estate had simply exercised its rights under the mortgage. Had the Estate done its due diligence with regard to entering the premises upon Hatfield's default, inspecting the premises, and investigating for evidence of waste, it certainly could have identified any waste committed upon the

premises by Hatfield, and thereafter, could have asserted its claim for waste in its complaint.

Thus, we are not persuaded by the Estate's contention that it had no prior opportunity to learn of the waste allegedly committed by Hatfield "until it was the successful sheriff['s] sale bidder and gained possession of the real estate." Estate's Br. at 9. The question of whether waste was committed on the premises went unanswered solely due to the Estate's inaction. Accordingly, we agree with the trial court that amendment of the Estate's complaint to include a claim for waste is barred under the claim preclusion branch of the *res judicata* doctrine. Thus, the trial court did not abuse its discretion when it denied the Estate's motion to amend its complaint to include a claim for waste.

2. Deficiency Judgment

Next, the Estate argues that notwithstanding our decision on its motion to amend its complaint, it is entitled to a deficiency judgment. The Estate argues that "[e]ven if [it] was not entitled to amend its complaint in order to assert a claim for waste against [Hatfield], the trial court erred in failing to enter a deficient judgment of $24,501.84 against Hatfield."[3] Estate's Br. at 10. We agree.

A deficiency judgment is "[a] judgment against a debtor for the unpaid balance of the debt if a foreclosure sale or a sale or repossessed personal property fails to yield the full amount of the debt due." Black's Law Dictionary 859 (8th 1999). It is undisputed

[3] This figure represents the difference between the amount that the trial court determined to be owing the Estate ($204,501.84), and the Estate's winning bid at the sheriff's sale ($180,000.00).

that the proceeds of the sheriff's sale failed to yield the entire balance owed to the Estate. By definition, such circumstances warranted the imposition of a deficiency judgment in the Estate's favor.

In his brief in opposition to the Estate's motion for determination of deficiency, Hatfield acknowledged in its argument that the Estate's deficiency judgment had "already been determined," and that the Estate was only entitled to a deficiency judgment in the amount of $24,501.84, which was "determined by subtracting the purchase price of $180,000.00 from the total judgment amount of $204,501.84, which would be $24,501.84." Estate's Br. at 35. Likewise, in his brief, Hatfield acknowledges the same, noting, "[The Estate's] Deficiency Judgment Has Been Determined and Admitted by [Hatfield]." Hatfield's Br. at 7.

We conclude that the trial court erred when it failed to award to the Estate a deficiency judgment in the amount of $24,501.84. Therefore, we reverse the judgment of the trial court as to the determination of deficiency and remand with instructions to enter a deficiency judgment consistent with this opinion.

Affirmed in part, reversed in part and remanded with instructions.[4]

CRONE, J., concurs.
FRIEDLANDER, J., dissents with separate opinion.

[4] Hatfield contends that he "is entitled to attorney's fees" because the Estate's motion for deficiency judgment, motion for leave to amend complaint, and current appeal is "frivolous, unreasonable and/or groundless." Hatfield's Br. at 8. We disagree. The Estate's appeal was neither frivolous nor taken in bad faith. *See* I.C. § 34-52-1-1. Accordingly, we decline Hatfield's invitation to award appellate attorney's fees.

IN THE
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ESTATE OF WALTER O'NEAL HATFIELD BY PAULINE HATFIELD, Personal Representative,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 82A01-0708-CV-375
JOHN O. HATFIELD,	)	
Appellee-Defendant.	)	

FRIEDLANDER, Judge, **dissenting**

I believe the Estate should have been permitted to amend its complaint and therefore respectfully dissent.

In rejecting the Estate's argument that the trial court erred in failing to allow it to amend its complaint under Trial Rule 15, the Majority essentially determines that the Estate waited too long to do so. My colleagues reject the Estate's claim that it could not enter the property and discover the waste until it had purchased the property at the sheriff's sale and conclude instead that the Estate could indeed have entered the property before filing its complaint "had [it] simply exercised its rights under the mortgage." *Slip op.* at 9. It seems to me that viewed in this manner, we are converting a right into a duty. In point of fact, I can envision several reasons why a mortgagee would not enter onto

foreclosed property prior to purchasing it at sheriff's sale. In my view, it does not matter here.

It has long been the case that a mortgagee is generally entitled to the legal remedy of a deficiency judgment for the balance of the debt remaining following a foreclosure sale. *See Arnold v. Melvin R. Hall, Inc.*, 496 N.E.2d 63 (Ind. 1986). In reviewing Indiana's foreclosure statutes, I find no prescription for the order in which a deficiency judgment must be pursued vis-à-vis a foreclosure complaint. Logic dictates that the amount of any deficiency cannot be finally determined until the proceeds of the sale are known. But that (i.e., the amount of the proceeds) is only half of the equation. The other half is the amount of damages suffered by the mortgagee as a result of the default. Must a mortgagee be restricted to submitting one complaint under which all items of alleged deficiency are included, without possibility of amendment? Mindful that a foreclosure action, including a deficiency judgment in conjunction therewith, invokes the equitable powers of this court, *see id.*, I see no reason to deny the Estate an opportunity to pursue a claim for waste merely on the basis that it did not discover the alleged waste at the earliest possible moment – in this case, before the foreclosure sale.

It appears to me that the Estate prosecuted its foreclosure action in a diligent manner. When that course led to reacquisition of the property, the Estate promptly entered and allegedly discovered that the defaulting mortgagor had committed waste. I perceive nothing in the Estate's actions that can be fairly characterized as constituting undue delay or bad faith, or as the product of dilatory motive on the Estate's part. Moreover, I cannot see how permitting the amendment will prejudice John Hatfield,

much less unduly so, except to the extent it subjects him to liability for waste – which is not the kind of prejudice envisioned by T.R. 15. *See Shewmaker v. Etter*, 644 N.E.2d 922 (Ind. Ct. App. 1994), *adopted*, *Hammes v. Brumly*, 659 N.E.2d 1021 (Ind. 1995) (the mere fact that the amendment led to summary judgment against the plaintiff did not demonstrate that the plaintiff was prejudiced by the amendment within the meaning of T.R. 15). I believe the trial court abused its discretion in denying the motion to amend and would reverse that ruling and remand with instructions to permit the amendment.

This leads me, finally, to the Majority's conclusion that *res judicata* bars the Estate's claim for waste. In this context, *res judicata* and the ruling on the Estate's motion to amend are opposite sides of the same coin. That is, if the Estate is permitted to amend, then *res judicata* necessarily is removed as a bar to the claim for waste.